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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JIMMY STEVE JIMENEZ, Defendant and Appellant.	B175010 (Los Angeles County Super. Ct. No. PA044164)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

Jimmy Steve Jimenez appeals from the judgment entered following his conviction by jury of two counts of robbery (Pen. Code, § 211) with admissions that he suffered four prior felony convictions (Pen. Code, § 667, subd. (d)), two prior serious felony convictions (Pen. Code, § 667, subd. (a)), and two prior felony convictions for which he served separate prison terms (Pen. Code, § 667.5, subd. (b)). He was sentenced to prison for 35 years to life.

In this case, we hold (1) the trial court properly admitted evidence of appellant's prior robbery to prove intent to steal, (2) a defense witness was properly impeached with his prior felony conviction, (3) no prosecutorial misconduct occurred during closing jury argument, and (4) the court did not err by giving CALJIC No. 2.62, since there was substantial evidence to support it.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that during the evening of April 8, 2003, appellant entered a McDonald's restaurant in Panorama City and waited in line to be served. Appellant had been a customer many times. Appellant later told the cashier, Santos Duran, "'Give me the money.'" Duran did not immediately surrender money. Appellant, simulating a gun under his jacket, screamed "'Give me the fucking money, I'm talking serious.'"

Nanette Aguilera, the restaurant manager, heard appellant and saw him simulating a gun. Aguilera thought appellant would kill Duran. Aguilera activated a police alarm and told a second employee to call 911. Duran, who was afraid, raised his hands and stepped back.

Aguilera gestured to Duran to wait because she wanted to stall for time until police arrived. Aguilera walked towards the cash register to open it and give appellant the money. She was wearing a uniform that was different from Duran's uniform. Appellant, looking at Aguilera, asked, "'Oh, you're the manager?'" Aguilera replied in the affirmative, and appellant said, "'Oh, okay, give me the money.'"

Aguilera offered to give appellant the money immediately. However, to stall for time, she asked an employee for a key to open the register. Appellant, simulating a gun, screamed, "'I told you to open the fuckin' register[.]'" Aguilera thought appellant would kill her if she did not surrender the money.

However, Aguilera, still stalling for time, only pretended to enter her password to open the register. Appellant, still simulating a gun, screamed, "'I told you give me the fuckin' money[.]'" Aguilera entered her password and appellant walked behind the counter. Using both hands, appellant grabbed money from a register, taking about $325 in currency and coins, and put the money in his jacket pocket. Appellant demanded that Aguilera open the next register. Aguilera replied there was no money in it, but appellant said, "'Open the fucking register. Give me this money.'" Aguilera opened the register, and appellant took coins from it. Appellant walked out the restaurant and jumped over a fence.

Aguilera testified that, during the incident, appellant was "really angry[,]" but "he was sure what he was doing, like he had experience . . . ." Appellant was not delusional. Aguilera also testified appellant was "looking like he was looking for that money, like he knows he's going for that money . . . ." Rocio Aldana also testified that, during the incident, she saw appellant simulating a gun and demanding money.

About 7:50 p.m. on April 8, 2003, Los Angeles Police Officer Richard Krynsky received a radio call that a robbery was in progress at the above McDonald's. Krynsky was about a block from the McDonald's. He went there and saw appellant run out the restaurant and jump over a wall. Krynsky and his partner pursued appellant on foot, Krynsky repeatedly yelled for appellant to stop, but appellant continued running. Krynsky was in uniform and, at one point during the pursuit, appellant turned and looked at him. Appellant later fell and was taken into custody. Appellant was searched but there was already money on the ground that had come from under his jacket. Appellant said, "'[Thirty dollars] is mine.'"

The parties stipulated that an officer would have testified that, on the above date, he conducted a patdown search of appellant and, during the search, wadded currency fell

from underneath appellant's clothing. The officer asked appellant what he was doing and appellant replied, "'I was getting some what the voices told me to do it.'" (*Sic.*) The officer asked appellant what the voices had told him to do, and appellant replied, "'Rob McDonald's.'" The officer asked appellant if he knew it was wrong to rob, and appellant replied, "'Yes, but it's too tempting.'" The officer recovered $325.85 from appellant.

2. *Defense Evidence.*

Appellant's sister testified that on Tuesday, April 8, 2003, appellant lived with her in Panorama City, about two blocks from the McDonald's. Two days before, she received a call from a nurse at a general hospital. Appellant had been found lying in the street. Alex Martinez, appellant's sister's husband, went to get appellant. According to Martinez, who had suffered a 1989 conviction for transportation or sale of narcotics, appellant had multiple injuries to his hands and face, his clothes were dirty, and he was in "very bad shape." Martinez told appellant that appellant could not continue living like this. Martinez testified that appellant looked at Martinez "incoherently" without responding.

Appellant, who had been convicted of three counts of robbery in 1991, and one count of assault with a deadly weapon in 1987, denied remembering anything about the April 8, 2003 events at the McDonald's. He testified he had a long history of mental problems and had been living with his sister for about a month after leaving a mental health program. Appellant also testified he was not receiving the correct medication and "that's when everything started happening." Appellant had a bad memory and often forgot appointments.

During cross-examination, appellant testified he had free will to disagree with the voices he heard, and he sometimes disagreed with them. He acknowledged he had used heroin, but testified that "heroin doesn't take your memory." Appellant knew it was wrong to steal and to simulate a gun and demand other people's money. Appellant testified he lived a block from the McDonald's and that he recognized Aguilera and Aldana when they were in court. The prosecutor asked appellant, "they're not lying, are they?" and appellant replied, "I don't see why they should lie about it." Appellant also

testified, "I'm not doubting what they're saying or anything. I was there. I went there all the time. I was there every day buying food from them, . . ."

3. *Rebuttal Evidence.*

In rebuttal, Estella Padilla testified that in 1991, she was a manager at a McDonald's in North Hollywood. A customer grabbed her by the sweater and demanded money at knifepoint. Padilla opened the register, and the customer took money from it and fled. A detective showed Padilla a photographic lineup containing appellant's photograph, and Padilla told the detective that appellant's photograph depicted someone who "looks like the man with the knife but this picture makes him look a little different.'"

CONTENTIONS

Appellant contends: (1) "The trial court erroneously admitted prior bad acts evidence to establish appellant's intent, for which reversal is required," (2) "The trial court erred in allowing the prosecution to impeach defense witness Alex Martinez with a remote prior felony conviction," (3) "The prosecutor's misconduct during her closing argument requires reversal of appellant's conviction," and (4) "The trial court erroneously gave CALJIC [No.] 2.62 for which reversal is required."

DISCUSSION

1. *The Trial Court Properly Admitted Evidence of Appellant's 1991 Prior Robbery to Prove Intent to Steal.*

a. *Pertinent Facts.*

On March 19, 2001, the court, discussing the admissibility of other crimes evidence, indicated as follows. The People intended to introduce evidence that appellant committed four 1991 robberies. In each instance, appellant entered a McDonald's, Burger King, or Taco Bell, approached the cashier with a weapon, and demanded money. Appellant reached into the register, and took money, during three of the four incidents. Appellant was convicted for each of the four robberies. The People were requesting that the robberies be admitted on the issue of intent.

Appellant objected that the robberies were too remote, insufficiently unique, and too prejudicial to be relevant, and also objected that the presentation of evidence

concerning the robberies would result in an undue consumption of time. Appellant noted that the prior incidents were different from the present offense since, in the prior incidents, appellant used a knife but, during the present offense, he only simulated a gun. Appellant's counsel indicated that "probative nature, its prejudicial nature, its remoteness, those are three elements I know the court needs to balance under [Evidence Code section] 352 to see if this kind of evidence would be admissible."

During argument, the parties conceded that identity was not at issue in this case. The prosecutor observed she intended three employee witnesses to testify concerning the prior robberies. One was from McDonald's and two were from Burger King, where appellant went twice. Appellant's counsel urged that he did not know what appellant's mental health issues were, if any, in 1991. Appellant acknowledged that, if he testified, evidence of the prior convictions would be admitted as impeachment evidence.

The court tentatively indicated that the proffered evidence was sufficiently similar to the present offense that the proffered evidence would be probative of intent or perhaps appellant's mental state. The court reserved ruling on the issue. The court later observed, "there is a certain pattern that seems to have taken shape in the commission of these offenses. I won't reiterate the points of similarity, but I guess there are many ways that you can rob an establishment. And he from the indications has chosen one of those particular patterns . . . ." The only witness who testified concerning the other crimes evidence was Padilla, who testified concerning appellant's 1991 robbery as reflected in our Factual Summary, *ante*. During jury argument, appellant's counsel urged that the "main thrust of the case[]" was "intent. That is state of mind."

b. *Analysis.*

Appellant claims that Padilla's testimony concerning the 1991 robbery should have been excluded. We disagree. Evidence Code section 351, states that, "Except as otherwise provided by statute, all relevant evidence is admissible." In *People v. Ewoldt* (1994) 7 Cal.4th 380*,* our Supreme Court discussed the relationship between, on the one hand, the degree of similarity between uncharged and charged offenses, and, on the other, the purpose for which uncharged offense evidence was offered. *Ewoldt* stated, "The *least*

degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent . . . . In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402, italics added.)

In both the 1991 incident and the present case, appellant, alone, robbed a McDonald's fast food restaurant, taking money from an opened register and fleeing. In both cases he used, or simulated use, of a weapon. The evidence of the 1991 robbery was relevant to the issue of intent to steal, which appellant placed at issue by his not guilty plea (*People v. Daniels* (1991) 52 Cal.3d 815, 857-858) and by his defense that he had mental problems which negated intent to steal, an element of robbery. (Pen. Code, § 211.) Padilla's testimony was not made inadmissible by Evidence Code section 1101, subdivision (a). (Cf. *People v. Ewoldt, supra*, 7 Cal.4th at p. 402; Evid. Code, §§ 210, 1101, subds. (a) and (b).)

Moreover, the tendency of the evidence of the 1991 robbery to prove intent was strong. (Cf. *People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) Appellant concedes he was convicted for the 1991 robbery (evidence of the conviction was admitted to impeach appellant). The fact that his conviction for the 1991 robbery occurred before the present offense meant that the source of the offense evidence as to the 1991 robbery was independent of the evidence of the present offense; the present case could not have influenced the determination that appellant committed the prior offense. (*Ibid*.) Moreover, the fact that appellant suffered a conviction for the 1991 incident decreased the danger that the jury in the present case might have been inclined to punish appellant for the 1991 robbery, and the fact of the prior conviction meant the jury had no need to determine whether the 1991 robbery occurred. (*Id*. at p. 405.)

The testimony concerning the 1991 robbery was no stronger or more inflammatory than the evidence of the present offense; this fact decreased the potential for prejudice. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405) The 1991 robbery was not too remote in time (cf. *People v. Ewoldt*, *supra*, 7 Cal. 4th at p. 405), and usually any remoteness of

evidence goes to weight, not admissibility. (*People v. Archerd* (1970) 3 Cal.3d 615, 639.)

Further, this is not a case in which the other crimes evidence was "cumulative regarding an issue that was not reasonably subject to dispute." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 406.) Although, even absent the other crimes evidence, there was sufficient evidence of appellant's intent to steal on April 8, 2003, the state of the evidence in the present case, absent the other crimes evidence, permitted a jury reasonably to consider whether, on that date, appellant did not commit robbery because he lacked intent to steal. We note appellant, in his discussion regarding his second contention (addressed in part 2, *post*) asserts that "the singular issue in the case was Appellant's intent and the evidence on that score was not open and shut." The trial court did not abuse its discretion by admitting evidence of the 1991 robbery as proof of appellant's intent to steal. (Cf. *People v. Ewoldt, supra*, 7 Cal.4th at pp. 402-407.)

A trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under Evidence Code section 352. (*People v. Williams* (1997) 16 Cal.4th 153, 213.) On this record, we believe the trial court understood and fulfilled its responsibilities under that section, and the trial court did not err by failing to exclude evidence of the 1991 robbery under Evidence Code section 352.

Moreover, even if the challenged evidence were inadmissible, the strength of the remaining evidence of appellant's guilt was strong. The fact of the 1991 robbery conviction was admitted as impeachment evidence. Appellant testified at trial that he did not see why Aguilera and Aldana "should lie about it." He did not doubt what they were saying, and admitted he was at the location. The claimed evidentiary error was not prejudicial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) None of the cases cited by appellant, or his argument, compel a contrary conclusion.

2. *Martinez Was Properly Impeached With His Prior Felony Conviction.*

Prior to Martinez's defense testimony, the court, outside the presence of the jury, discussed Martinez's possible impeachment with his 1989 conviction for a violation of Health and Safety Code section 11352. Appellant objected that the prior conviction was too remote, Martinez was 17 years old when the case in which he suffered the prior conviction was filed as an adult case, and Martinez had suffered no subsequent additional convictions. The court ruled the prior conviction was admissible to impeach Martinez, noting, "[t]here are cases that certainly go as far as 20 years for this purpose[.]" At trial, Martinez admitted during cross-examination that he had suffered a 1989 conviction for transportation or sale of narcotics.

Appellant claims the trial court abused its discretion by allowing Martinez to be impeached with the prior conviction because, according to appellant, it was too remote. We reject the claim. The trial court did not abuse its discretion by permitting Martinez to be impeached with an approximate 14-year-old prior conviction. (Cf. *People v. DeCosse* (1986) 183 Cal.App.3d 404, 411-412; *People v. Benton* (1979) 100 Cal.App.3d 92, 97.) The fact that Martinez would be impeached with his prior conviction did not deter him from testifying, which also supports the trial court's decision to admit the evidence. (Cf. *People v. Carpenter* (1999) 21 Cal.4th 1016, 1056; *People v. Clarida* (1987) 197 Cal.App.3d 547, 554.) Moreover, there was ample evidence of guilt, therefore, reversal of the judgment is not required. (*People v. Watson*, *supra*, 42 Cal.3d at p. 836.)

3. *No Prosecutorial Misconduct Occurred During Closing Jury Argument.*

Appellant claims the prosecutor committed reversible misconduct when, during closing jury argument, the prosecutor urged, as discussed below, that a crazy person would not have done the various things appellant did. We reject the claim.

During the People's closing argument, the prosecutor argued appellant was telling the jury, "'I don't remember'" because he did not want to take responsibility for what he did. The prosecutor then argued that appellant's actions during the incident were "extremely deliberate[,]" and "weren't the actions of somebody who was unconscious."

The following then occurred, "[The Prosecutor:] And they also considered the actions of someone crazed. Crazy people -- we all, living in L.A. County, we unfortunately would have a crazy person would not have waited in line at the McDonald's. [*Sic.*] [¶] [Defense Counsel]: I object. Foundational grounds. [¶] The Court: I'll overrule."

The prosecutor then urged without objection: "A crazy person would not have waited in line to get close to the cashier. The crazy person would have barged right in, screamed and yelled, said whatever they were going to say, and just stood there. A crazy person would not have deliberated enough to get two registers on top of one. A crazy person wouldn't have distinguished between a low level cashier and a manager. A crazy person would not have busted out the front door, taking off running as soon as they saw the police. Does that seem like a crazy person to you? No."

Appellant failed to object on the ground of prosecutorial misconduct or request a jury admonition with respect to the prosecutor's comments, which would have cured any harm. Appellant has waived the prosecutorial misconduct issue on appeal. (Cf. *People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Clark* (1993) 5 Cal.4th 950, 1016; *People v. Mincey* (1992) 2 Cal.4th 408, 471.)

Moreover, a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Appellant, who did not plead not guilty by reason of insanity, was conclusively presumed to have been sane at the time of the offense (Pen. Code, § 1016) and his sanity was not at issue. Accordingly, the jury probably recognized the prosecutor's comments, not as scientific or medical information concerning how legally insane or crazy people act, but as hyperbole in the context of an argument that appellant's alleged mental condition did not negate intent to steal. (Cf. *People v. Wharton* (1991) 53 Cal.3d 522, 567.) The prosecutor's comments were fair comment on the evidence, and nothing the prosecutor did violated due process, or was so

reprehensible or deceptive as to constitute prosecutorial misconduct. (Cf. *People v. Gionis*, *supra*, 9 Cal.4th at pp. 1214-1215.)

Finally, the record sheds no light on why appellant's trial counsel failed to object on the ground of prosecutorial misconduct or failed to request a jury admonition. Appellant's trial counsel was not asked for an explanation, and we cannot say there simply could have been no satisfactory explanation. We reject appellant's claim that his trial counsel's failure to object on the ground of prosecutorial misconduct or failure to request a jury admonition constituted ineffective assistance of counsel. (Cf. *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

4. *The Court Did Not Err by Giving CALJIC No. 2.62, Since There Was Substantial Evidence to Support It.*

The court, without objection, gave to the jury CALJIC No. 2.62, pertaining to when an adverse inference may be drawn from a defendant testifying. That instruction reads: "In this case defendant has testified to certain matters. [¶] If you find that the defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against him does not, by itself, warrant an inference of guilty, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence."

Appellant claims the giving of the instruction was error because, according to appellant, there was no substantial evidence to support it. We disagree.

Appellant, who did not enter a plea of not guilty by reason of insanity, was conclusively presumed to have been sane at the time of the offense. (Pen. Code, § 1016.)

However, he suggested he had a mental condition and a bad memory which resulted in his failing to remember anything about the April 8, 2003 events at the McDonald's. The jury reasonably could have concluded that appellant's explanation was implausible. They obviously rejected it. The giving of CALJIC No. 2.62 was proper. (Cf. *People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1030.)

Moreover, the court instructed the jury with CALJIC No. 17.31, which informed the jury, inter alia, that not all instructions were applicable. There was ample evidence of appellant's guilt. Any error in giving CALJIC No. 2.62 to the jury was not prejudicial. (Cf. *People v. Saddler* (1979) 24 Cal.3d 671, 680; *People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.